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Issue Date: 19 December 2005

CASE NOS. 2005-LHC-0932
2005-LHC-0933

OWCP NOS. 01-148806
01-150967

In the matter of:

ANTHONY DIBLASE
Claimant

v.

LOGISTEC OF CONNECTICUT, INC.
Employer/Self-Insured

Appearances:

David Kelly, Monstream and May, Glastonbury, Connecticut
On behalf of the Claimant

Neil J. Ambrose, Letizia, Ambrose and Falls, New Haven, Connecticut
On behalf of the Employer

Before: Colleen Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING MEDICAL BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Anthony DiBlase ("Claimant") against Logistec of Connecticut, Inc. ("Logistec" or "Employer"), under the provisions of the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("LHWCA" or "the Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in New London, Connecticut on June 22, 2005, at

which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Hearing Transcript is referred to herein as "TR." The parties offered stipulations, and testimony was heard from the Claimant. TR 5-7. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-4. TR 9-12, 53-54, 87-90.[1] Logistec also offered documentary evidence, which the Claimant objected to on the basis that the Employer's attorney did not follow the pretrial order in terms of serving exhibits. This objection was overruled, and the documentary evidence was admitted as Employer's Exhibit ("EX") 1. TR 13-15. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-8. TR 15-17. Following the hearing, the parties filed post-hearing briefs, and the record is now closed.

My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Stipulations and Issues Presented

The parties have stipulated to the following: (1) the LHWCA applies; (2) the injuries occurred on December 28, 1999 and August 26, 2000; (3) the injury occurred at the Employer's premises; (4) the injures arose out of and in the course of the Claimant's employment with Logistec; (5) there was an employee/employer relationship at the time of the injuries; (6) the claim was timely noticed and filed and there was no initial notice of controversion; (7) the informal conference was held on December 14, 2004; (8) the Claimant's average weekly wage at the time of the injury was $640.65; (9) temporary total disability benefits were paid from December 28, 1999 through March 27, 2000 and from November 14, 2000 through January 2, 2001, and temporary partial disability benefits were paid from August 29, 2000 to November 13, 2000. TR 5-8.

The issues in dispute are (1) whether the Claimant's ongoing need for medical treatment is the result of the injuries that he sustained while employed at Logistec, and if so, (2) whether the Claimant's ongoing medical treatment is reasonable and necessary.

B. Background

The Claimant was born on October 7, 1956. TR 20. He completed high school and worked part-time at print shops and as an expediter prior to commencing employment at Logistec. TR 20. He began working at New Haven Terminals, the predecessor organization of Logistec, in 1983 as a laborer in the hull and as a forklift operator, loading and unloading vessels that came into port, and doing "whatever they needed [him] to do." TR 20-21. In 1999, he had multiple duties and was a forklift operator, a hatch boss, and a yard jockey at given points in time

[1] At hearing, the Claimant's counsel agreed to copy and send to the Court by June 29, 2005 documents identified during the hearing as CX 5 which consisted of progress notes from Dr. Spak dated 11/22/00, 3/12/01, 3/25/02 and 4/8/02. Those documents were never received by the Court. Therefore, CX 5 was not received into evidence. TR 88-89, 91.

depending on which other employees were present at work. TR 21. As a forklift operator, he moved cargo between the dock and the warehouse and placed the cargo into the appropriate bays. TR 22. The Claimant also operated a forklift on vessels, and was required to arrange the cargo so as to maximize each lift of the crane and expedite the discharging of the cargo. TR 23-24. Often the forklift was operated on rough surfaces, and was driven over other cargo or over the deck of the ship that had dents and minor potholes in the surface that would have to be worked around. TR 24. When operating a forklift, the Claimant testified that he was required to operate the hydraulics and controls with his right arm and steer with his left hand. TR 25. The Claimant asserted that over the course of time, the operation of forklifts became "very troublesome" for both of his shoulders because if the hydraulic lift was operating, the power steering would not function correctly and would restrict the ability to turn the machine, requiring him to use more force with his left hand to steer the forklift. TR 25. Further, if a load spilled off of the forklift, everybody in the hatch had the responsibility to pick up the spilled product, however there were usually only two laborers there at any given time. TR 26. At times, as the forklift operator the Claimant had to get off of the forklift and reload the spilled product, which involved physically picking up the boxes and stacking them. TR 26. The Claimant testified that a forklift operator faces many physical demands including constant driving backwards, requiring that he look over his shoulders while operating the hydraulics and steering mechanisms, while maneuvering over the imperfections of the surfaces being driven on. TR 28.

As a hatch boss, he was responsible for supervising both laborers and forklift operators inside the hole of the ship, and ensuring that work was done in a proper and safe manner. TR 28. The Claimant testified that there were physical challenges in this role, because the hatch boss continued to function as an operator in the hole and was also responsible for restacking cargo. TR 28. As yard jockey, he backed empty box trailers into the warehouse building so that they could be loaded with cargo. TR 21.

The duties that he performed depended on how many people were working, and that could change within the same day. TR 29. If there was more than one gang working on a ship, there would be a hatch boss for each gang, however if there was only one gang working on a ship the most senior employee, not necessarily the Claimant, would be the hatch boss. TR 30-31. Depending on the number of gangs present at a particular time, the Claimant's role could change, and it varied "from day to day and shift to shift." TR 31-32. Roles were assigned based on individual seniority and port seniority, and depending on whether the Claimant was working in New Haven or Bridgeport, his seniority was different. TR 33. His regular place of work was Bridgeport, which gave him advantages in getting jobs in that location. TR 34. Because his seniority was lower in New Haven, it was likely that he would be assigned a laborer job there. TR 35.

In 1998 and 1999, the New Haven Port was strictly a steel port and the materials being handled were steel related, including rolled steel, zinc, copper, wire rod, steel pipe, beams and plates. TR 22. Steel girders were one of the products that came into the port, and as a laborer the Claimant was required to remove the steel girders from the ship. TR 22. This was done by binding the steel together with chains that were approximately three quarters of an inch thick and approximately 22 to 26 feet long, and hooking the bundles to cranes so that they could be discharged from the ship. TR 22-23. Two people were assigned to each chain so that one person

was on each side to pull the chain, because it was more than one person could do alone. TR 23. It took two or three workers to pull a chain from one place to another because the cargo could be extremely heavy, and weighed from 16 tons to approximately 24 tons when it was taken out of the boat. TR 23.

The Claimant testified that he began to have trouble with his shoulder is the mid 1990's, in approximately 1996 or 1997. TR 35. In December of 1999, the Claimant was operating a forklift inside the ship and he hit a pothole on the surface. TR 36. He had one hand on the hydraulics and the other hand on the steering wheel, and when he hit the pothole the impact jarred his right shoulder to the point that he couldn't lift his arm. TR 36. He immediately reported his injury to the hatch boss and the dock foreman and sought medical treatment. TR 36-37. The Employer recommended that the Claimant be seen at the Industrial Medical Clinic where he was examined and his shoulder was evaluated, and he was instructed that he should seek further treatment with the physician of his choice. TR 37.

Within approximately one week of the injury, the Claimant undertook care with James Spak, M.D., an orthopedic physician. TR 37-38. The Claimant stated that he told Dr. Spak that he was having difficulty with both of his shoulders, but indicated that his right shoulder was worse than the left at that particular point in time. TR 38. The Claimant explained his shoulder injury and the background of his occupation. TR 38. The Claimant then had x-rays and an MRI. TR 38. Dr. Spak recommended treatment for the Claimant, and subsequently recommended arthroscopic surgery on his right shoulder to correct an impingement which was performed on January 28, 2000. TR 38-39. The Claimant was out of work following the surgery and was paid workers' compensation. TR 43. He received follow-up care and regular examinations from Dr. Spak, as well as physical therapy at Advance Back and Neck Center in Milford. TR 43. The Claimant testified that the physical therapy helped him to regain the mobility and some of the motion in his shoulder. TR 43. The bills for his treatment with Dr. Spak and for physical therapy were paid by the insurance company. TR 43. The Claimant returned to work following the surgery with restrictions placed upon him for a short period of time. TR 44. The Claimant testified that he had the same duties upon his return as he did prior to the injury and that he coped with work "okay" following the surgery. TR 44. However, there was some work that he did not do because it was too physically demanding and he didn't want to re-injure himself, such as working as a laborer in the hole. TR 46.

In August of 2000, the Claimant injured his left shoulder on a lumber ship in New Haven while attempting to climb up onto a unit of lumber to discharge it from the ship. TR 46. The Claimant testified that after this incident he was unable to lift up his arm and was "pretty much incapable of using it." TR 46-47. He sought medical care following the injury and eventually Dr. Spak performed surgery on his left shoulder in November 2000. TR 47. Following the surgery, Dr. Spak provided follow-up care and prescribed physical therapy. TR 48. The Claimant testified that the physical therapy made him "feel better" and increased his shoulder mobility and "strengthened [his] shoulders and…arms to the …point that [he] felt comfortable enough to use them again for work." TR 48. The Claimant testified that Dr. Spak's care and physical therapy helped him return to work following the injury. TR 48. Upon his return to Logistec, he performed the same duties of hatch boss, yard jockey, or forklift operator, depending on seniority and the number of people working. TR 48. The Claimant stated that

there were jobs that he did not feel comfortable doing because of the condition of his shoulders, such as working as a laborer in the hole of a steel ship. TR 49. There were times that the Claimant did not go to work because work as a laborer was the only available job for him at that time. TR 49.

After returning to work following the shoulder surgeries, the Claimant's shoulders have felt "pretty much the same, not better, not worse" and "continue to bother [him] on a daily basis in doing [his] every day routine." TR 54. Further, overhead activities and lifting extremely heavy objects aggravate his shoulders more than other activities. TR 54-55. The Claimant testified that his shoulder condition remains the same throughout the course of the day, but his shoulders seem stiffer in rainy damp weather. TR 55. His shoulder condition affects his ability to sleep because he has pain in his shoulder that wakes him up at night and he is unable to sleep on either side for any extended period of time. TR 57. He testified that his shoulders have been "pretty much like a toothache on a daily basis….they are both sore every single day." TR 55. He feels the need to continue to see Dr. Spak so that he can be examined and make sure that the condition does not worsen. TR 56. When he saw Dr. Spak on November 26, 2001 for a follow up examination one year post surgery, he told him that he had limited motion and the ability to do certain things was restricted, such as overhead activities or reaching behind him, and he was unable to do things now that he was able to do in the past. TR 56.

The Claimant voluntarily resigned from Logistec in December of 2001. TR 65. He is currently self-employed operating a seasonal fence company and a snowplowing business in the winter. TR 65. In his snowplowing business, he operates a flatbed truck with an automatic transmission and power steering, and he installs the plow on the truck. TR 65, 67. He is required to back up the vehicle in the course of plowing, using his right arm to shift gears and steering with his left arm. TR 68. He also at times carries a bucket full of salt that weighs 10 to 15 pounds, and fills the bucket from a 25 pound salt bag. TR 70.

In his fencing business, he performs the job estimates, ordering, and supervises additional laborers when they are working to assist him. TR 66. He installs fences, which requires him to lift fence posts that weigh up to 30 pounds, shovel dirt, and carry panels that weigh approximately 30 pounds. TR 70. He uses tools that assist in the digging of holes. TR 72-73. He has used a manual post hole digger that excavates the loosened dirt in the hole and he removes and piles the excess dirt. TR 73. He has also used a powered auger which must be pulled to start like a lawnmower and requires that he hold the auger in place to drill a hole into the ground. TR 73-74. He is required to carry materials from the truck to the site of the fence installation, including materials weighing up to 50 pounds or more, which he has carried alone or with the help of others. TR 76. He has also been required to lift 60 pound bags of concrete on an as needed basis. TR 76. The Claimant stated that he prefers to take on smaller fencing jobs that only last a few days because in part they are less stressful on his shoulders and back as he is doing some of the physical labor involved in the job. TR 75. The Claimant testified that in the course of his self employment activities, he has suffered no new injuries to his shoulders and has not suffered any particular incidents or problems with his shoulders on the job. TR 66. He has not been involved in a motor vehicle accident since leaving Logistec nor has he suffered any additional trauma to his shoulders. TR 66. Between the time he left Logistec and March 2004 he did not treat with Dr. Spak for his shoulder condition. TR 67.

On March 15, 2004 the Claimant returned to Dr. Spak because he felt more discomfort in the shoulders and he wanted to have a check up with him to see if his condition had worsened. TR 57. Dr. Spak examined him and looked for range of motion and discomfort with activities. TR 57. The Claimant told Dr. Spak that his shoulders bothered him in the course of his work and daily routine. TR 77-78. The Claimant also stated that he is on a basketball team that he participates in on a limited basis, and he plays softball one time a week in season. TR 78-79. At that time, Dr. Spak recommended that the Claimant go to physical therapy because he felt that it would help alleviate his symptoms. TR 58.

The Claimant was reexamined by Dr. Spak on September 10, 2004 because his shoulders were continuing to cause him discomfort at a level that the Claimant felt was greater than usual. TR 58-59. The Claimant told him that his arms felt weak perhaps as a result of his shoulder conditions or the tendonitis in his arms, elbows and wrists which may be aggravated by his shoulder condition. TR 59. Dr. Spak took x-rays and prescribed physical therapy to relieve discomfort and the tendonitis problems that the Claimant was experiencing. TR 60. The Claimant went to physical therapy and was given a full examination and evaluation of his condition, a range of motion test, electro stimulus and heat therapy. TR 60. The Claimant testified that this was done to relieve the pain and discomfort in his shoulders and so that he could eventually do exercises to help strengthen his arms and shoulders. TR 60-61. The Claimant said that therapy was to be provided over multiple visits, three times per week, which was the plan that Dr. Spak prescribed. TR 61. The Claimant is not currently undergoing physical therapy because the physical therapist has refused to treat him because the insurance company did not pay the initial bill. TR 61. The Claimant testified that as far as he knows the bills for the physical therapy, as well as the visits to Dr. Spak in March of 2004 and September of 2004, are still unpaid. TR 61-62. The Claimant testified that he needs the physical therapy that Dr. Spak prescribed and would like to go back to Dr. Spak to ensure that his shoulder conditions do not worsen or reoccur. TR 62. The Claimant testified that Dr. Spak told him that because he uses his shoulders and back in his work there is a definite potential for further shoulder problems. TR 64. The Claimant stated that since sustaining his injuries, there has never been a week when he has not a problem with his shoulders. TR 64. He has continued to run his fencing business through December of 2004 and snowplowed in the winter of 2004 and 2005. TR 84. He testified that his shoulders do not hurt more at the end of the day as a result of his fencing business, they hurt as much as they do every day. TR 85. The Claimant reported that his work at the fencing company did not significantly change how his shoulders felt. TR 86.

C. Medical Records of James Spak, M.D.

Medical records indicate that on January 12, 2000, the Claimant was seen by James Spak, M.D. for pain in both shoulders. CX 4 at 1. Upon examination, Dr. Spak diagnosed him with positive impingement and tenderness at his AC join and his anterolateral subacromial space. *Id*. At that time, Dr. Spak scheduled the Claimant for surgery to relieve pain that was "completely disabling." *Id*. The surgery was performed on his right shoulder on January 28, 2000. CX 4 at 3. Following the surgery, Dr. Spak saw the Claimant on February 8, 2000 and noted that the Claimant was about to start formal physical therapy. CX 4 at 2. On February 22, 2000, Dr. Spak reexamined the Claimant and noted that the Claimant's pain was continuing to diminish although

he still had trouble sleeping on the right side. *Id*. Further, he released the Claimant to return to work with restrictions. *Id*. On March 21, 2000, the Claimant was again seen by Dr. Spak. CX 4 at 5. He noted that the Claimant was sleeping better and that he had some residual discomfort in the shoulder but only about 10 percent of what he had preoperatively. *Id*. He stated that the Claimant was ready to return to fully duty work at that point. *Id*. The Claimant was seen again on May 16, 2000, and Dr. Spak noted that he had regained all of his motion and had excellent cuff strength with only mild tenderness. CX 4 at 6. On July 10, 200 Dr. Spak noted that upon examination, the Claimant had excellent strength and motion and gave him a rating of 10 percent impairment based on mild residual pain and the fact that he had surgery. CX 4 at 7.

On August 31, 2000 the Claimant returned to Dr. Spak for evaluation and treatment of his left shoulder. CX 4 at 8. He noted that the Claimant was climbing at work and had sudden pain in the left shoulder and has had much increased pain since that time. *Id*. He noted that the Claimant experience great difficulty with overhead activities and some trouble sleeping. *Id*. He stated that he had a moderately severe impingement in his left shoulder. *Id*. He prescribed physical therapy and pain medication and released him to work with a restriction of no overhead lifting for four weeks. CX 4 at 8-9. On September 28, 2000, Dr. Spak indicated that the Claimant was disabled from August 26, 2000 through September 4, 2000. CX 4 at 11. Further, on that date he examined the Claimant regarding his left shoulder. He stated that the Claimant was "a bit better with injection and therapy but is still struggling a bit." CX 4 at 12. He stated that not performing overhead activities has helped, but the Claimant continued experience discomfort. *Id*. Dr. Spak observed point tenderness over the anterolateral aspect of the scromion process and the AC joint and he noted pain on specific motions. *Id.* On October 19, 2000 the Claimant was reevaluated by Dr. Spak who noted that the AC joint was arthritic and inflamed and that was a likely source of the pain. CX 4 at 13. Dr. Spak further indicated that the Claimant had rotator cuff impingement. Dr. Spak scheduled surgery for the Claimant's left shoulder and performed a decompression and Mumford on November 14, 2000. CX 4 at 13, 16.

Dr. Spak examined the Claimant on November 15, 2000, December 13, 2000, and January 22, 2001 for follow up visits. CX 4 at 18, 19, 22. On September 24, 2001, Dr. Spak examined the Claimant as a follow-up to left shoulder surgery. CX 4 at 23. He noted that the Claimant "still struggles with overhead activities, finds that he is sore if [he] has to lift anything heavy overhead and if he has to do any persistent overhead work." CX 4 at 23. He also stated that the Claimant "feels that the situation has very much improved compared to his pre-operative status, but his shoulder is clearly not completely well or normal." *Id*. He stated that he had encouraged the Claimant to perform general home exercises that were taught to him. *Id.* On examination Dr. Spak observed point tenderness over the anterolateral aspect of the acromion process and pain on flexion and abduction above 90 degrees and positive impingement sign. *Id.*

On November 26, 2001 the Claimant was reexamined by Dr. Spak. He noted that the Claimant was having some anterior aching, and the aching becomes quite significant if the Claimant has worked hard during the day. CX 4 at 24. He stated that he had mild residual tenderness and mild cuff weakness, and his motion was quite good. *Id*. At this time, Dr. Spak assigned the Claimant an impairment rating of 15 percent on the left shoulder based on surgery and residual symptomology. *Id*. He stated that he would see the Claimant on an as-needed basis. *Id*.

Dr. Spak next examined the Claimant on March 15, 2004 for "follow-up and rating of both shoulders." CX 1 at 2. Dr. Spak noted that the Claimant "has been left with shoulders that do bother him on a day to day basis in the course of his work. He now owns his own a fencing company and does work in that regard and is bothered on a day to day basis." *Id*. He further noted that the shoulder pain occasionally interferes with sleep and he takes Advil to treat the pain 2 to 3 times per week. *Id*. He noted that the Claimant has been able to continue playing basketball once a week and plays softball in season as well. *Id*. He stated that motion is well preserved in both shoulders and there is moderate rotator cuff weakness and tenderness in the subacromial space on both sides. *Id*. Further, across arm abduction is minimally painful. *Id*. He stated that "all in all he is left with shoulders that are quite functional but obviously still bothersome." *Id*. Dr. Spak assigned the Claimant a 15 percent permanent partial impairment rating or each shoulder and noted that he would see him on an as needed basis. *Id*.

The Claimant was re-examined by Dr. Spak on September 10, 2004 regarding his shoulders and pain in his arms. CX 1 at 1. Dr. Spak's note states that the Claimant has noticed increasing pain over the past few months, and has sensed that he is very weak in his arms. *Id*. He also noted that the Claimant "has trouble lifting thins [sic], not only above shoulder level but even below." *Id*. He again stated that the Claimant has had difficulty sleeping and is taking Excedrin. *Id*. Further, he stated that the Claimant had occasional numbness going down his arms but not very frequently. *Id*. Dr. Spak stated that upon examination of both shoulders the Claimant does have well preserved motion. Further, he has positive impingement findings and has mild weakness of his rotator cuff and pain with resisted rotator cuff function. *Id*. He noted that radiographs of his shoulders show some regrowth of his distal clavicle on the right but not the left. He opined that the pain is "mostly coming from residual rotator cuff difficulty" although he could not explain all of the Claimant's symptoms in his hands and arms. *Id*. He stated that initial treatment would consist of Naprosyn and he prescribed physiotherapy, and the Claimant was to be reexamined in a month. *Id*.

D. Medical Examination by Patrick Ruwe, M.D.

Patrick Ruwe, M.D. performed an independent medical examination on the Claimant on February 22, 2005 at the request of the Employer. EX 1. He reviewed other medical notes and x-rays during the course of his evaluation. *Id*. He opined that the Claimant suffers from a persistent bilateral shoulder impingement and right AC joint arthrosis. Further, he stated that he does not believe that formal physical therapy is necessary at this point for the Claimant as he is "not performing a home exercise and that would be the place to start, particularly since he has been through it with both shoulders and clearly would have an understanding of what exercises to do." *Id*. He further opined that the Claimant's "work and recreational activities are certainly contributing to persistent impingement" *Id*. He concluded that the Claimant has reached maximum medical improvement and gave him a permanent partial impairment rating of 10% for each shoulder. *Id*. He stated that he does not believe that the Claimant has suffered any additional increase in his impairment since it was initially assigned. *Id*.

E. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. §902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused the harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Indep. Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption. The burden of proof then shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); Merrill, 25 BRBS at 144; *Parsons Corp. of Cal. v. Director, OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. Dist. Parking Mgmt Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; rather, it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. An employer may rebut the Section 20 presumption of causation by producing substantial evidence that the condition was caused by a subsequent, non-work related event. *James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989). The Benefits Review Board has held that if there has been a subsequent non-work related event, the employer can establish rebuttal of the presumption of causation by producing evidence that the Claimant's condition was not caused by the work-related event. *James*, 22 BRBS at 274. However, an employer is liable for the disability if the second injury is the natural or unavoidable result of the first injury. *Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454, 457 (9th Cir. 1954); *Merrill*, 25 BRBS 140 (1991). But where the second injury is the result of an intervening cause, the employer is not liable for that portion of the disability attributable to the second injury.

If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del*

Vecchio v. Bowers, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP,* 688 F. 2d 862 (1st Cir. 1982).

In this case, the parties stipulated that the Claimant sustained two shoulder injuries, the first on December 28, 1999 and the second on August 26, 2000, that arose out of and in the course of the Claimant's employment with Logistec. TR 6. The Claimant subsequently had surgery on both shoulders and the Employer covered those medical bills. The issue at present is whether the Claimant's current shoulder condition is the result of his shoulder injuries at Logistec or whether the current shoulder condition is caused by a superseding event, employment in the Claimant's fencing business. The Employer contends that the Claimant's subsequent employment at his fencing business which includes lifting heavy weights and some laboring activities constitute an intervening event and superseding cause for the current shoulder condition and need for follow-up medical care thereby breaking the chain of causation. Emp. Br. at 6-9.[2]

The Claimant credibly testified that following surgery on his shoulders he returned to work at Logistec but was unable to perform certain laboring tasks that he had performed before his shoulder injuries. TR 49, 55. The Claimant further testified that he continued to experience shoulder pain daily following the surgeries in January and November 2000 to treat the right and left shoulder injuries he sustained at Logistec. TR 54.

In a September 24, 2001 office visit, the Claimant's surgeon, Dr. Spak notes that the Claimant has been working his normal longshore occupation, but that the Claimant reports that he struggles with overhead activities. On examination Dr. Spak noted pain with forward flexion greater than 90 degrees and abduction greater than 90 degrees. On November 26, 2001 Dr. Spak notes the Claimant continues to experience some pain when he works hard, and he observed mild residual tenderness over the anterolateral subacromial space, mild cuff weakness and he stated motion was quite good. The Claimant did not consult with Dr. Spak again until March 15, 2004. At that point Dr. Spak's notes indicate the Claimant presented for follow-up and a rating for both shoulders. Dr. Spak's progress notes indicate that the Claimant now owns a fencing business and that his shoulders bother him on a daily basis in this work. On examination, Dr. Spak found the shoulder motion was well preserved in both shoulders, but there was moderate rotator cuff weakness and tenderness in the subacromial space on both sides, and minimally painful arm abduction. After assessing a permanent impairment rating, Dr. Spak indicated he would see the Claimant on an as-needed basis. Although Dr. Spak does not offer a clear specific opinion on whether the Claimant's current shoulder condition and pain is the natural consequence of, related to or contributed to by the injuries he sustained at Logistec, Dr. Spak's examinations and progress notes from November 2001 and March 2004 reflect essentially the same shoulder condition, with an increase in rotator cuff weakness and continued tenderness over the subacromial space in both shoulders. I conclude from these medical records that the Claimant has continued to experience these bilateral shoulder conditions, as well as ongoing pain of varying degree, since the initial injuries suffered at Logistec. I find that the Claimant has satisfied his initial burden of showing harm, a bilateral shoulder condition and shoulder pain

[2] The Claimant's brief fails to separately address the critical causation issue other than the statement that "…no evidence has been submitted by the respondent which suggests that the claimant's current shoulder problems are not causally related to compensable work injuries." Cl. Br. at 10.

resulting at least in part from employment at Logistec and, he has therefore, successfully invoked the presumption of causation pursuant to Section 20 of the Act. Therefore, the burden now shifts to Logistec to sever the connection between the Claimant's current shoulder condition and shoulder pain and his employment at Logistec.

Logistec points to evidence showing that after the shoulder surgeries in January and November 2000, the Claimant's physician released him to return to work without restrictions in January 2001. Logistec contends that the Claimant performed his full regular duties as a longshoreman at Logistec without difficulty from January to December 2001 when he voluntarily resigned from Logistec and began working at his snow plowing and fence installation business. Logistec argues that the Claimant's activities at the snowplowing and fencing businesses have caused the Claimant's current shoulder condition and associated pain. Logistec contends that the Claimant's doctor note on March 15, 2004, indicating that the Claimant is running his own businesses and that he is experiencing shoulder discomfort and pain, is the closest the Claimant's physician comes to providing a cause of the Claimant's current pain. Logistec also relies upon the opinion of Dr. Patrick Ruwe of Connecticut Orthopaedic Specialists in its effort to rebut the Section 20 presumption. Dr. Ruwe diagnosed persistent bilateral shoulder impingement and right AC joint arthrosis. Logistec points out that Dr. Ruwe opined that the Claimant's subsequent work activities at the plowing and fencing business were a contributing cause of his shoulder condition. Dr. Ruwe also noted that the Claimant states that his shoulder pain never completely resolved after the initial injury and Dr. Ruwe acknowledges that this is "well documented in [claimant's] medical record." EX 1 at 2. Dr. Ruwe concludes that the Claimant's fencing work and recreational activities are contributing to his current shoulder condition. However, Dr. Ruwe he does not offer an opinion on the key issue of whether or not the Claimant's current shoulder condition and ongoing pain is a natural consequence of or is contributed to by the initial shoulder injuries while employed at Logistec. Stated differently, Dr. Ruwe does not state that the initial shoulder injuries sustained at Logistec do not play a role in his current bilateral shoulder impingement. In addition, Dr. Ruwe has opined that he does not believe the Claimant has suffered any additional increase in his impairment since an impairment rating was initially assigned by Dr. Spak. This statement supports the Claimant's position that his shoulder condition has neither improved nor significantly deteriorated since Dr. Spak first assigned permanent impairment ratings in July 2000 and November 2001. As a consequence, Dr. Ruwe's opinion is not sufficient to rebut the presumption. Accordingly, I find that Logistec has failed to sever the connection between the Claimant's initial shoulder injuries and his current ongoing condition.

In sum, I have concluded that the Claimant's current bilateral shoulder condition results from the natural progression of and is contributed to by the shoulder injuries he sustained at Logistec.

F. Reasonableness and Necessity of Dr. Spak's Treatment and of Physical Therapy

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A determination of the reasonableness and necessity of medical treatment is a question

of fact for the administrative law judge. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

Following the shoulder injuries at Logistec in 2000, the Claimant treated with Dr. Spak and received physical therapy. The Employer covered those services and there is no dispute between the parties that those initial treatments were reasonable and necessary. The issue at present is whether continued treatment with Dr. Spak including office visits on March 15 and September 10, 2004 and continued physical therapy sessions for his shoulder conditions are reasonable and necessary. The Claimant contends those services are reasonable and necessary and the Employer disputes that contention. Cl. Br at 9-12; Emp. Br. at 9-10.

With regard to continued treatment with Dr. Spak, the Employer does not address the necessity or reasonableness of Dr. Spak's treatment in its brief and instead focuses solely on whether formal physical therapy treatment is reasonable and necessary. Emp. Br. 9-10. As I have found that the Claimant's current bilateral shoulder impingement is the natural consequence of his initial shoulder injuries and is caused in part by the shoulder injuries at Logistec, I conclude that Dr. Spak's continued examination of the Claimant's shoulder condition during exacerbations of the condition is reasonable and necessary. Accordingly, the Employer is responsible for reasonable and necessary medical treatment provided by Dr. Spak including his past bills for services.

The question of whether formal physical therapy is reasonable and necessary under the circumstances present here is a closer call. Dr. Spak has recommended formal physical therapy. However, on September 24, 2001, following the Claimant's shoulder surgeries and formal physical therapy, Dr. Spak instructed the Claimant to do his home shoulder exercises to maintain his shoulders. Dr. Spak did not change this recommendation when he saw the Claimant on November 26, 2001. The Claimant did not see Dr. Spak again until March 2004. Dr. Spak's office notes of November 2001 and September 2004 do not show significant difference in the condition of the Claimant's shoulders. Other than simply a new recommendation for physiotherapy made on September 10, 2004, neither Dr. Spak nor the Claimant have provided a rationale for the necessity of formal therapy as opposed to a home exercise program to strengthen the Claimant's shoulders. Dr. Ruwe, the Employer's expert, has opined that formal physical therapy is not necessary at this point as the Claimant is not performing home exercises which would be the place to start especially since the Claimant has undergone physical therapy following the two surgeries and is familiar with the proper exercises to perform for his shoulder condition. In the absence of an explanation from Dr. Spak as to why formal physical therapy is necessary as opposed to a home exercise program and considering Dr. Ruwe's opinion that a formal physical therapy program is unnecessary and that a home exercise program would be appropriate, I find that the Claimant fails to establish that a formal physical therapy program is reasonable and necessary.

G. Attorney Fees

Having been partially successful in establishing his right to medical benefits, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's counsel is afforded 30

days to file a fully supported and fully itemized fee petition pursuant to 20 C.F.R. §702.132(a) and the Employer shall file any objections within 15 days thereafter.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer, Logistec, shall provide the Claimant, Anthony DiBlase, such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related bilateral shoulder condition may require pursuant to 33 U.S.C. § 907;

2. The Claimant's attorney shall file, within 30 days of receipt of this Decision and Order, a fully supported and fully itemized fee petition pursuant to 20 C.F.R. § 702.132(a), sending a copy thereof to counsel for the Employer and Carrier who shall then have fifteen (15) days to file any objections;

3. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts